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Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 1085.

IN THE MATTER OF THE APPEAL OF THE UNITED STATES RELATIVE TO A DECISION OF THE BOARD OF GENERAL APPRAISERS AS TO AN IMPORTATION OF MERCHANDISE MADE BY SCHOVERLING, DALY & GALES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

COMSTOCK & BROWN,
Attorneys for Respondents.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

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And now, on the 7th day of March, 1892, comes Albert Comstock, one of the attorneys for the importers (respondents) above named, and moves the Court to advance the case above named, to be heard at the earliest day at which the convenience of the Court will admit.

The case was brought by the above-named importers to review the action of the Collector at the Port of New

York, in assessing duty alleged to be in excess of the amount warranted by law on certain parts of guns, viz: gun stocks. Duty was assessed on them at the rate of $1.50 each and 35 per cent. *ad valorem*, under the provision of schedule C, paragraph 170, of the Tariff Act of October 1st, 1890, for "all double-barreled, sporting, breech-loading shot-guns, valued at not more than six dollars each." The importers maintain that the gun stocks are properly dutiable at 45 per cent. *ad valorem* only, under the same schedule of said Tariff Act, paragraph 215, as manufactures not specially enumerated, composed in part of metal. The case turns upon the question whether the provision above cited for shot-guns provides an enumeration for the stocks for such guns when imported alone, so as to remove them from the operation of paragraph 215.

The Board of General Appraisers having sustained the Collector's assessment above referred to, the importers duly appealed, pursuant to the provisions of the Act of June 10, 1890, entitled "An Act to simplify the laws in relation to the collection of the revenue," and the United States Circuit Court for the Southern District of New York, upon such appeal, reversed the decision of the Board of General Appraisers. An appeal to this Court was then taken, on behalf of the United States, from such decision of the said Circuit Court.

The grounds on which this motion to advance is made are:

1st. That the question involved is of great importance to the trade and commerce of the country. The rate of duty exacted being prohibitive, all transactions

in the class of goods involved must cease if it is to be sustained, and the principle involved being one of general application, many branches of business are kept in a condition of unfortunate suspense pending the decision of this Court.

Furthermore, the proposition involved in the ruling of the Board of General Appraisers is radical, involving a wide and sudden departure, on the ground of preserving the morality of the business community, from long-recognized tenets of law, and it is respectfully submitted that justice to merchants requires the speedy settlement of any question involving a radical change of view concerning the laws which govern their transactions.

2d. The Board of General Appraisers at New York is subjected to a great and increasing embarrassment in the hundreds of protests accumulating upon its calendar on the questions involved in this action, and upon which it has thus far suspended its action in order not to multiply litigations.

But there is no warrant of a continuance of this suspension, and as the Board is naturally desirous of clearing its calendar, those who have protested are menaced with the necessity of commencing a large number of actions, which, under the present law, must in every case be brought within thirty days after an adverse decision. Already some scores of such protests have been set for hearing and decision, and only by great effort was the Board induced to suspend its action for a while, to await a settlement of the principles involved, by a decision of this Court.

3d. The action is one provided for by Section 15 of the Act of June 10, 1890, above cited, which specifically provides: "Said Supreme Court shall have jurisdiction and power to review such decision, and shall give priority to such cases," and the Court has already taken cognizance of such provision in advancing the several cases which have come up under the Act, such as the case of Boyd, Sutton & Co., the case of Ballin, Joseph & Co. and others, and these have all been heard and finally disposed of.

This is a renewal of a motion made in the present case on the 13th day of April, 1891, and which was then denied by the Court. No opinion accompanied that decision, but as cases involving the constitutionality of the entire Act under which this question arises were then pending, it is inferred that the Court saw fit to dispose of those before proceeding to the consideration of questions arising under the Act. The cases as to constitutionality having now been decided, the motion to advance this case is respectfully renewed.

ALBERT COMSTOCK,
Of Counsel for Respondents.

COMSTOCK & BROWN,
Attorneys.

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BRIEF FOR THE UNITED STATES.

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STATEMENT OF CASE.

In this case the appellees, on October 20, 1890, imported, per steamer *Amsterdam*, certain gunstocks with the usual metal mounting, complete, but without the barrels. Prior to the importation such importers had entered into an agreement with Mr. Schoverling, one of their partners, by which the latter was to order the barrels for these goods, with the mutual understanding that the stocks and barrels,

after arriving at the port of New York by different shipments, we e to be put together so as to make complete double-barreled sporting breech-loading shotguns (Rec., pp. 6, 7). It is conceded that nothing remained to be done after importation except the ordinary manipulation of putting them together, which involves neither labor nor skill, and only requires that the parts be placed together and a slide or spring adjusted.

Duty was assessed on these stocks at the rate of $1.50 each and 35 per centum ad valorem, under the provisions of Schedule C, paragraph 170, of the tariff act of October 1, 1890, which reads as follows:

> All double-barrelled, sporting, breech-loading shotguns, valued at not more than six dollars each, one dollar and fifty cents each; valued at more than six dollars and not more than twelve dollars each, four dollars each; valued at more than twelve dollars each, six dollars each; and in addition thereto, on all the above, thirty-five per centum ad valorem. Single-barrel breech-loading shotguns, one dollar each and thirty-five per centum ad valorem. Revolving pistols valued at not more than one dollar and fifty cents each, forty cents each; valued at more than one dollar and fifty cents, one dollar each; and in addition thereto, on all the above pistols, thirty-five per centum ad valorem.

The importers claimed that the gun stocks were properly dutiable at 45 per centum ad valorem only, under paragraph 215 of the same schedule, which reads as follows:

> Manufactures, articles, or wares not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, lead, copper, nickel,

pewter, zinc, gold, silver, platinum, aluminum, or any other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem.

The Board of General Appraisers sustained the collector's assessment, from which ruling there was an appeal to the Circuit Court, which court, per Lacombe, J., reversed the action of the General Appraisers, holding in effect that the question of intention with which the act was done did not enter into the case at all, "provided the importers have done no more than what under the terms of the tariff they may do." (*In re* Shoverling, 45 Fed. R., 349.)*

This appeal is prosecuted to reverse the result reached in the court below.

SPECIFICATION OF ERROR.

The court below erred in reversing the decision of the board of General Appraisers, and holding that it was competent for a partnership to make a contract with one of its own members, by which one was to order the finished gunstocks, with locks and mountings, and the other to order the gun barrels, with the intention of putting the parts together after they had passed the custom-house; and that such contract and conduct was operative as against the provisions of paragraph 170, Schedule C, of the tariff act of October 1, 1890, and that goods so imported were entitled to entry under paragraph 215 of the same schedule and act.

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* The clerk has not published the opinion of the court below, as provided in Rule 8, and the same is therefore printed as an appendix to this brief.

ARGUMENT.

"*A fraud upon a statute is a violation of the statute.*" Such was the language of this court in *Bank of the United States* v. *Owens* (2 Pet., 527, 536), as applied to a case where the bank was forbidden to "take more than at the rate of 6 per centum for or upon its loans or discounts." The note sued upon only called for the lawful rate, but when discounted the proceeds had been paid to the borrower in the depreciated notes of the Bank of Kentucky at their nominal value. The transaction was held illegal in the language above quoted.

This is but one of many instances where a doctrine which must commend itself to the conscience of every honest man has been announced.

> Courts of justice, even with the consent of the opposite party, will not enforce a right or contract in violation of a statute, although not expressly declared void by enactment. (*Powell, Cont.*, 166; *Comyns, Cont.*, 59; *Bank* v. *Owens*, 2 Pet., 527; *Coppell* v. *Hall*, 7 Wall, 542); * * *
>
> If a plaintiff can not open his case without showing that he has broken the law, courts of justice will not assist him to recover whatever his justice may be. (*Fowler* v. *Scully*, 72 Pa. St., 456.)
>
> *Burbank* v. *Conrad* (96 U. S., 291, 302); *Oscanyan* v. *Arms Company* (103 U. S., 261).

It may be said that this is not a quarrel between the partners, and therefore there is no occasion to pass upon the validity of the contract. If the contract is void as against public policy, it is so not only as between the partners, but as against the Government sought to be de-

frauded, and the question is then to be determined as though the gunstocks and barrels had been imported by this firm directly, and not by indirect methods.

Their confessed purpose and aim was to import guns. The parts were to be put together. They did import guns by a fraudulent arrangement under which one of their number imported separately a necessary part. The question of what is imported and its character should be determined by the result, stripped of the thin disguise of separate shipments, made pursuant to the terms of a void contract.

In *Merritt* v. *Welsh* (104 U. S., 694–700) this court held that where sugar was colored to make it meet the description of a lower classification, the importer was not guilty of fraud. By coloring the sugar, or melting it, he had changed its character, and thereby changed the amount of the duty to which it was subject.

The case at bar seems within the exception there and in *United States* vs. *Breed* (1 Sumner, 159, 166) recognized:

> There must be substantially an introduction of the very thing taxed under a false denomination or cover with the intent to evade or defraud the act.

The case of *Seeberger* vs. *Farwell* (139 U. S., 608) belongs to the same class. The character of the goods was there changed by mixing cotton with the body of woolen cloth, as was the sugar by the addition of the coloring matter

This is also true of the case of *Magone* vs. *Luckemeyer* (139 U. S., 612). In these cases it was held by the court that the plaintiffs were not prohibited from so manufac-

turing goods as to conform to a lower rather than a higher exaction of the tariff. In other words the thing imported was not the thing covered by the statute; here, as has been noted, such is not the fact.

The case at bar is within the principle of *Falk* v. *Robertson* (137 U. S., 225). There it was claimed that under a statute (22 Stat., 503), providing "Leaf tobacco of which eighty-five per cent. is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound. All other tobacco in leaf, unmanufactured, and not stemmed, thirty-five cents per pound." If the importer added to each bale 17 per cent. of leaf tobacco not fit for wrappers, thus reducing the percentage below 85 per cent., the entire bale was to be taxed only at 35 per cent. This was done, of course, for the purpose of avoiding the higher duty. The court held:

> The unit is not the bale, but is the separated quantity of such leaf tobacco. That quantity stands, for the purposes of duty, as if it had been imported in a bale which contained nothing but itself. By the method of packing, the wrapper tobacco and the filler tobacco remained entirely distinct. The association of them in the bale was, evidently, only for the purpose of avoiding the higher duty imposed upon the superior tobacco. This association was to be dissolved the moment the bale was opened in the United States, because the two grades sold for different prices in the market.

So here the gun is the unit. That stands as if it had been imported already put together; no more work or

labor was required to make it a finished gun. No skill was required to attach the parts. By the method of packing, the barrel and stock were kept apart; the separation of them was evidently for the purpose of avoiding the higher duty. This separation was to be dissolved the moment the custom-house had been passed. The parts separated, as such separate parts, had, and could have, no market in the United States.

If it was competent for the court to separate the contents of the bale for the purpose of enforcing the law, which cannot be justly doubted, it is competent to join the parts for the same purpose.

The mere juxtaposition of the completed parts of one whole, or want of it, can not determine its character for purposes of taxation.

This is in accord with the decision in *Worthington* v. *Robbins* (139 U. S., 337), where it was held that "white hard enamel" used for various purposes, the form and condition when imported affording no indication of the use to which it was to be applied, requiring to be ground or pulverized, and new processes of manufacture applied before it could be made of any practical use, should be assessed as an unenumerated article, manufactured in whole or in part, and not as "watch materials," though the particular importation was made for use in making watch dials. This language is used:

> It appears further, that the form or condition of the merchandise as imported affords no evidence or indication of the use to which it is to be applied; that, in the form or condition as imported, it can not be used for any of the purposes mentioned, nor

for any purposes whatever of practical use to which it is adapted or ever applied; and that, before it can be applied to any practical use, its present form and condition must be changed by grinding or pulverizing, and new processes of manufacture be applied.

It is apparent, from the facts stated, that the customs officers could not determine from an examination of the article to which of the uses named it was to be applied, or that it was to become the material of a watch. In order to produce uniformity in the imposition of duties, the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported. In order to be dutiable as "watch materials," the article, when imported, must be in such form of manufacture as to show its adaptation to the making of watches.

In the present case every test there laid down as absent is present. The several acts contemplated by the contract should, as against the parties thereto, be treated as one act, as an importation of guns, and the duty as having been properly levied.

Certain well-settled rules of interpretation or construction seem applicable to this case.

To carry out the object of a statute it must be so construed as to defeat all attempts to do or avoid, in an indirect or circuitous manner, that which is prohibited or enjoined. (Bacon's Ab., Stat. J.)

In fraudem, legis facit, qui, salvis verbis legis, sententiam ejus circumvenit. (3 Dig., 1, 3, 29.)

Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud. (2 Inst., 48.)

Whenever courts see such attempts at concealment "they brush away the cobweb varnish, and show the transactions in their true light." Per Wilmot, C. J., in *Collins* v. *Blantern* (2 Wils., 349).

Whatever may be the form and color of the transaction, the law looks to the substance of it. Per Lord Tenterden in *Solarte* v. *Melville* (1 Man. & Ry., 204).

Whatever is prohibited by law to be done directly can not legally be effected by an indirect and circuitous contrivance. Per Tindal in *Booth* v. *Bank of England* (7 Cl. Tin., p. 540).

It is a well-known principle of law that the provisions of an act of Parliament shall not be evaded by shift or contrivance. Per Abbott, C. J., in *Fox* v. *Bishop of Chester* (2 Brl., p. 655).

I am aware that the application of these principles depends upon the question whether this importation as made is actually or virtually prohibited by the tariff act. I admit that the importer has a right to do what has not in effect been prohibited, and that it is not an evasion of a statute to keep outside its provisions. Not every attempt to do this is, however, successful.

A beer-shop keeper, licensed to sell beer only to be drunk *off* the premises, evades the act if he sells beer to be drunk on a bench which he provides for his customers close to his shop, *the intention* making it substantially a sale on the premises, and he was held properly convicted. (*Cross & Watts*, 13 C. B., N. S., 239.)

The character of an act is to be determined not alone by itself, but by its result, together with the purpose or intention of the person doing the act.

The courts look to intention in all such cases. In *Croft* v. *Quinby* (6 H. L. Cas., 672, 738–740), Lord Cranworth used this language:

> The question is, whether a warrant of attorney given under the circumstances stated in this case, namely, *bona fide* given to secure debts, and nothing more being stated than that, does or does not amount to giving an encumbrance within the meaning of this clause.
>
> This is a point which has been several times of late under discussion; I have more than once in the discharge of my official duties had occasion to consider it; and I confess it is a point upon which I have very often had great difficulty in making up my mind, but in the result I still adhere to the opinion which I expressed in this house two or three years ago in the case of *Lane* vs. *Horlock*. This is a point upon which it is impossible to state any abstract rule that shall govern every case, but I am of opinion, as I there stated, that simply giving a warrant of attorney, if it is *bona fide* given to secure a debt which the party might recover by process of law, and in respect of which if the debtor does not give a warrant of attorney, the creditor will recover judgment adversely; in such a case a warrant of attorney given in order to avoid the expense of law proceedings is not a charge within the meaning of that statute. But if a person, not having a power of assigning or charging the property, gives a warrant of attorney with a view to evade that restriction which is imposed upon him then the circumstances may be such as to make it amount to a charge or encumbrance, or at least to estop him from saying that it is not a charge or encumbrance to all intents and purposes.
>
> The distinction is admirably illustrated by the case of *Doe d. Mitchinson* v. *Carter*, in which the princi-

ple was elucidated in both its aspects, for in the first instance there had been an ejectment brought, and there it was found that a person who was restrained from assigning had given a warrant of attorney. The court of king's bench, after a long argument, held that that did not amount to a breach of the restriction against his charging the property. He could not help his creditors bringing an action and recovering judgment, and if he, to save the expense and vexation and delay of an action, gave a warrant of attorney in order to close the proceedings at once, the court held that he might lawfully do that in order to arrest the legal consequences, and that therefore that was no breach.

But a second ejectment was afterwards brought in which, I think, upon a special verdict, it was found that the lessee, wishing to assign the property, entered into a compact with a person to whom it was to be assigned, and because he could not do that *per directum*, he gave a warrant of attorney which would enable the other to take it in execution. When that second verdict came to be considered, the court of queen's bench held that that entirely varied the case, and under those circumstances the warrant of attorney was held to be a breach of the covenant or restriction not to assign, and judgment was given accordingly.

Now, applying that principle to the present case, in advising your lordships, I am required to say whether there is upon the face of this special case anything which ought to satisfy your lordships that the giving of this warrant of attorney was a contrivance by Mr. Lumley to effect an assignment, which he could not affect directly. Being so called upon, I say that I think there is nothing to warrant any such conclusion.

Upon this distinction Baron Bramwell rested his opinion (pp. 700–703), as did also Mr. Justice Coleridge (p. 731).

The same principle is applied in *Jeffries* v. *Alexander* (8 H. L. Cas., 594). There.

> A, being possessed of some pure personalty, but of considerable property in mortgages, executed, some years before his death, an indenture, by which, declaring a wish to found certain charities, he covenanted to pay, or that if he did not pay during his lifetime, his executors should, within twelve months after his death, subject to his debts and legacies, pay to certain persons therein named the sum of £60,000 to be invested in their names on the trusts thereby declared; the trusts were charitable trusts. This deed was never enrolled in chancery. On the same day he made a will giving certain legacies and appointing executors, most of whom were the persons named in the deed.
>
> These papers were never communicated by him to anybody. Just before his death he caused these papers to be produced from his drawers and handed them to the persons attending his deathbed. They were tied up with a memorandum which declared that they had been prepared in that form, under advice, to save the legacy duties and in order that if probate duty was paid in the first instance it might be got back again in consequence of the covenant creating a debt to be paid out of the assets.
>
> *Held*, That the indenture was a deed and not a testamentary paper; but,
>
> *Held also*, That so far as realty was to be affected it was void within the statute of mortmain. (9 Geo. 2, c. 36.)

In the argument of this great case the Attorney-General (Sir R. Bethel, afterwards Baron Westbury), in answer to a question of the Lord Chancellor whether the paper would operate both as a deed or a will, said (p. 607):

> In arguing on the operation of the statute the other side has forgotten the great distinction between things resulting from the act of the party and things resulting from the operation of law; yet *Doe d. Mitchinson* v. *Carter* has presented that distinction in a marked point of view, and the true principle is clearly stated in *Croft* v. *Lumley*, where all the cases are collected. The result of the legal operation of a judgment is not to be considered as a thing done by the contract of the party.

To which the Lord Chancellor answered:

> That is, without express evidence of intention.

And the Attorney-General replied:

> Yes; a warrant of attorney which puts in operation legal machinery, the result of which operation is a charge upon land, is not to be treated as itself a charge. There is the distinction between the act and the *intuitus*. The rule is, that where the thing prohibited is the result of the rule of law following on the act of the party, but is not the act of the party himself, it is no violation of the prohibition. The supposed policy of the law and the tendency of acts are not guides for the construction of a statute. The principle is correctly given in the head-note to *Philpott* v. *St. George's Hospital* (6 H. L. Cas., 338). The devise there not being brought within the words of the statute, it was held good.

His construction was not sustained by the majority. Baron Wilde said (pp. 620–621):

> I am of the opinion that the deed in question can take no effect as regards the testator's real estate; and I come to this conclusion upon the simple ground that the deed and the proceedings contemplated to be taken upon it are, and were intended to be, nothing else than the machinery by which the testator might appropriate his lands after his death to charitable uses. I am satisfied that the testator entered into this covenant for the express purpose of achieving indirectly that which he could not do directly without openly and plainly violating the statute (9 Geo. 2, c. 36). It is hardly possible upon the facts of the case to arrive at any other conclusion.
>
> This indirect violation of the statute no court of law ought, in my judgment, to uphold if the words of the statute are large enough to meet the case.
>
> I agree that the operation of a statute is not to be extended beyond what the words express; but it is one thing so to read the words of a prohibition as to include all modes and ways of doing the prohibited thing; it is another to extend it to things not expressly prohibited.
>
> I think this case is within the very words of the statute, and that the testator has attempted to "give," "charge," and "encumber" his lands for charitable uses.
>
> One who confesses a judgment for the purpose of bringing about a charge on his lands does, in substance, charge and encumber his lands. One who enters into a covenant with a view of a judgment being obtained upon it, and so charging his lands, does still in substance, though more circuitously, charge and encumber his lands. One who, by means of a covenant judgment and execution against his

lands, all contemplated at the time the covenant is entered into, contrives that his lands shall be given to charitable uses, does in substance "give" his lands to charitable purposes.

I, therefore, feel in no degree pressed by the arguments founded on the precise terms employed in this statute, and I regard all that has been done only as a circuitous method of "giving" the testator's lands for the benefit of this charity.

I construe the statute as if it had said in so many words "directly or indirectly;" and I do so because I think it is plain, looking to the whole scope of the act, that the legislature did not intend that it should be lawful to do that by indirect means which it prohibited by every species of direct means that could be enumerated.

In such and analogous matters the law always regards the substance and not the form or method. If a contract is in substance tainted with usury, the courts have always held it void, though the object of the contractors was ever so cunningly concealed in the form given to the transaction. If a contract is substantially a wager, no matter how the end is brought about, the same fate has always attended it in a court of law. A still closer illustration is found in the case of a covenant not to assign. The court, once satisfied that the warrant of attorney was given for the purpose of bringing about a transfer through the medium of a judgment and execution, held the warrant of attorney to be a breach of a covenant not to assign. To hold otherwise would be, in my opinion, to invite a dexterous use of legal learning and forms to enable men to accomplish what the law forbids. In a word, it is the gift or devotion of lands to charitable purposes that is substantially prohibited here. If that is accomplished the statute is infringed,

and, in my opinion, it signifies nothing in what manner that end is brought about.

Mr. Justice Byles said (pp. 628, 629):

> There are many instances in which attempts have been made to break sometimes through acts of Parliament, and sometimes through conventions between parties, by ingenious artifices which, at first sight, seem rather the acts of the law than the acts of the parties, and therefore appear to be no violations either of the act of Parliament in the one case or of the contract in the other. But when a court of law sees that the real intention of the contriver was to violate a statute or a contract, and that that intention has been, in point of fact, effected by using acts of the law to compass what the statute or the contract prohibits, the judges have looked through the form at the substance and real nature of the transaction. * * *
>
> So in *Sharpe* v. *Thomas* it was held that a warrant of attorney given by a man who intended to take the benefit of the insolvent debtor's act was a charge on his property within the meaning of the act. Though the execution was the act of the law, yet the debtor's intention made it the act of the party, and changed its nature, or more properly speaking, the court of common pleas disregarded its form and looked only at its real nature.
>
> So here the true question seems to me to be a question of intention; and although intention be rather matter of fact than of law, yet I can not answer your lordship's question without coming to a conclusion as to Mr. Brame's intention. Original intention may give to an act the character of a grant or conveyance; continuing intention may make the result certain. Looking at all the circumstances, did Mr. Brame intend to do that which the law forbids, and

> has he taken such measures to accomplish his intention as to make the violation of the law the necessary consequence? I do not say, did he intend to evade the law, but did he intend to violate it? for it has been said that a man may evade a statute if he can, yet, on the other hand, it is plain that he must not violate it directly or indirectly. The word intention is equivocal; it may denote an intention to do that which is designed as an aim or main object of the intending party, or it may mean that which he merely foresees as a result to which he is indifferent.

It remains to inquire whether the act of the appellees is in any way prohibited or contrary to the provisions of the tariff laws then in force.

In the examination of this question I assume that the contract by which the barrels were to be imported by one member of the firm, and the stocks by the firm itself, and the confessed intention of bringing the parts together after they reached this country, are all to be considered one act or scheme within the cases above cited.

Is this forbidden by any law?

In the first place the act prescribing a certain duty on "double-barrelled, sporting, breech-loading shotguns" impliedly, at least, enacts that no goods answering the description shall be brought into the country without the payment of such duty.

The act of June 10, 1890, section 5 (26 Stat., 132–133), requires the importer to make oath that he has "not in said invoice concealed or suppressed anything whereby the United States may be defrauded of any part of the duty lawfully due on said goods and merchandise."

This is not an important provision of itself, but taken in connection with section 6 of the same act, providing a penalty for the knowingly making of any false statement in the declarations referred to, or aiding or procuring the making thereof, and the following language from section 9 becomes significant:

> If any * * * importer * * * shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, *or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any willful act* or omission by means whereof the United States shall be deprived of the lawful duties or any portion thereof accruing upon the merchandise or any portion thereof embraced or referred to in such invoice * * * such merchandise shall be forfeited.

Applying the well-known principle that "where a statute, with a view of affording protection to the public, imposes a penalty for doing an act it thereby prohibits it and renders it illegal" (Sutherland Statutory Construction, Sec. 335), it becomes apparent that these, the appellees, are violators of the law.

That such an arrangement as is disclosed by this record is a "fraudulent practice" and a "willful act," by which the United States was to be deprived of the lawful duties levied upon imported guns, seems too clear to require extended argument.

The conclusion is that these parties have not merely evaded a law; they have violated it; they have been guilty of a fraud upon its provisions, which the law renders

unavailing and does not permit them to profit by. As was said by a sage of the olden time, "It is not the words of the law but the internal sense of it that makes the law: the letter of the law is the body; the sense and reason of the law is the soul."

This is not in conflict with *Robertson* v. *Gerdan* (132 U. S., 454), where it was held that pieces of ivory for the keys of pianos and organs were dutiable as manufactures of ivory, and not as musical instruments. The conclusion was there reached solely from the intention of the law-makers, as shown by the history of the legislation upon that subject.

Here the whole scheme characterizes the importation as one of guns, made by the same firm, and pursuant to an arrangement by which the guns should be imported in separate parts. The importation takes its character from the arrangement.

Again, the duty was rightly assumed under the provisions of an act supplementary to the several acts imposing duties on goods, wares, and merchandise imported into the United States approved January 29, 1795 (1 Stat., 411), which provides in the second section as follows:

> Where any entire article is by any law of the United States made subject to the payment of duties, the parts thereof when imported separately shall be subject to the payment of the same duties.

I do not find that this provision has ever been repealed. The entire act in which it is contained is marked "obsolete" in the statute, but by what authority does not ap-

pear. It certainly does not become so by mere lapse of time or by disuse. Such a rule would make obsolete the Ten Commandments. Some action of Congress must be found, or this law stands as a direct command to the customs officer to levy the duty exacted in this case.

As was said in the case of *Aspden's Estate* (2 Wallace, jr., 368, 431):

> A later act has never been construed to repeal a former act, unless there be a contrariety or repugnance in them, or at least some notice taken of the former act, so as to indicate an intention in the lawgiver to repeal it.

The law does not favor a repeal by implication unless the repugnance is quite plain. Also, when two acts are seemingly repugnant, yet if there be no clause of *non obstante* in the latter, they shall, if possible, have such construction that the latter may not be a repeal of the former by implication.

It is earnestly insisted that any other rule than the one here contended for will put a premium on rascality and low cunning, bring the law into disrepute, and make it impossible for honest merchants to compete with the Fagins of trade; the entire community will thereby be robbed, and, worse than that, the morals of the people be corrupted.

CHARLES H. ALDRICH,
Solicitor-General.

APPENDIX.

In re Schoverling (45 F. R., 349).

Lacombe, circuit judge (orally). The question of intention does not enter into this case at all, provided the importers have done no more than what, under the terms of the tariff, they may do. Such is the doctrine of the *Luckemeyer* and *Farwell cases*, referred to on the argument. Whether their object was to make their goods more readily salable in this way, or by this particular method of importation to secure the entrance of the goods here at a lower rate of duty than they would otherwise have to pay, is wholly immaterial, provided that what they have done is within the terms of the tariff act. Now, there is no evidence that these articles were ever "assembled" or brought together with the gun barrels on the other side. There is no finding to that effect by the appraisers, and, if there were such a finding of fact, I should be constrained to reverse it, because there is no evidence in the record to support it.

I do not mean by this to imply that that single fact would be controlling of the case if it were here; it is enough to say that is it not here. For all that appears the gun stocks may have been bought from one manufacturer, and the gun barrels from another. They came here under a provision of the tariff act which lays a duty upon "sporting, breech-loading shotguns," and lays a separate and different duty upon the parts of which those sporting, breech-loading shotguns are composed, as "manufactures in whole or in part of metal." It can be fairly assumed that Congress by that very terminology meant to allow importers who chose to do so to bring in fragments

of a combination article by different shipments, and then to employ domestic labor in putting them together. It may have been intended to induce importers to employ to that extent the labor of this country, instead of having the article combined abroad.

We can not tell, of course, what operated upon the minds of the framers of that particular passage of the act. We can only deal with their language as they have set it down for us, and under that language it seems very clear that there is nothing in this shipment except "gunstocks mounted," articles which are properly described in the tariff, only by the phrase "manufactures composed wholly or in part of metal;" and they should therefore pay that duty, and no other. The decision of the board of appraisers is reversed.

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Supreme Court of the United States.

OCTOBER TERM, 1892

No. 690.

UNITED STATES

vs.

SCHOVERLING, DALY & GALES.

BRIEF FOR IMPORTERS, APPELLEES.

ALBERT COMSTOCK,
Of Counsel for Appellees.

EVENING POST JOB PRINTING HOUSE, NEW YORK.

Supreme Court of the United States.

UNITED STATES vs. SCHOVERLING, DALY & GALES.	No. 690.

BRIEF FOR IMPORTERS, APPELLEES.

It is regrettable that the argument of the appellees' side of this case must begin with the pointing out of certain inaccuracies, doubtless unintentional, in the brief of the Solicitor-General, but these are of such a nature that it seems imperative to correct them. Thus, on the second page of his brief he states that "it is conceded that nothing remained to be done after importation except the ordinary manipulation of putting them (the imported parts of guns) together, which involves neither labor nor skill, and only requires that the parts be placed together and a slide or spring adjusted." We study the record in vain for any such concession, nor could any such fact have been found or conceded, since it is self-evident that even the hypothetical process described would involve labor, if not skill.

Again, on page 5, he says that the appellees "*did import* guns by a fraudulent arrangement," &c., whereas it is nowhere found, nor does any evidence show, that any barrels were ever imported to fit the stocks here in controversy. Nothing beyond an *intention to have such barrels imported* (R., p. 8, fol. 19) has been found or shown. And on page 7 it is asserted that the parts of guns imported could have no market as separate articles in the United States. This is unsupported by a scintilla of evidence, and seems to be a mere assumption of our opponent. It is also contrary to reason, if his assertion as to the ease of completing guns from the barrels and stocks be correct. Beyond these corrections, it is only necessary to add to the statement of the case as made by the Solicitor-General, that the gun stocks which constituted this importation were articles composed wholly or in part of iron or steel, and were nowhere in the Act of October, 1890, specially enumerated or provided for. They were, therefore, exactly within the operation of Par. 215 of said act (R., p. 8, fol. 18).

Argument.

1.

This case involves, in a very simple form, the application of principles so well and repeatedly enunciated by this Court as to be familiar to all of us. It is, despite the ingenious attempts of our learned antagonist to distinguish them, the Gerdau case, the Farwell case, the Welsh case, the Luckemeyer case, over again, and, despite his ingenious attempt to draw a parallel, it is essentially different from the case of Falk *vs.* Robert-

son. All the burden of his disapproval could be applied, with scarcely the change of a word, to those "iniquitous practices" whereby sugar was brought down in color, and woolen cloth changed by the introduction of a cotton fibre, expressly to meet the provisions of the law. Yet this Court has decided that those were legitimate practices, and that Congress cannot be supposed to have intended their prevention. Great stress has been laid here upon the alleged improper contract between the appellees and one of their partners, whereby they imported the stocks and he was to import the barrels, and it is argued that the question at issue must be determined as though gun stocks and barrels had both been imported by the appellees. Again we must point out that, for the purposes of this argument, there were no barrels imported by any one. But suppose there had been, and suppose they had both been imported by the appellees! Is it against the law, or is it a questionable transaction for one man or one firm to import gun stocks and gun barrels, by separate importations, to pay the duty legally applying to them, and to have the intention, and to give effect to the intention, to make guns of them when they get here? Applying this simple, and, we submit, inevitable test to the case at issue, the arguments of the learned counsel for the United States are seen to be inapplicable to it.

2.

It is contended by the Solicitor-General that the act of these appellees was a violation of the *intent* with which Congress prescribed a certain duty on complete shotguns. It is a sufficient answer to this, we think, to point out that Congress, in the exercise

of its discretion, fixed this duty, by the most unequivocal language, upon the complete guns, and, to quote the language of Mr. Justice Lamar in St. Paul, M. & M. R. Co. *vs.* Phelps (137 U. S., 528, 536), "Where a statute, as in this case, is clear and free from all ambiguity, we think the letter of it is not to disregarded in favor of a mere presumption as to what is termed the policy of the Government."

3.

In the case of *Falk* vs. *Robertson* (137 U. S., 225) tobacco of various grades had been made up into a single package, and the Court held that this package might properly be divided into its different grades and proper duty exacted on each grade. There is no implication here that it is warrantable for collectors to establish a theoretical union between several importations in order to find in such combination all the elements of an article subject to a higher duty than such elements. Does the gentleman mean to maintain that to make separate importations of barrels and of stocks involves a question merely of a "method of packing"?

4.

Again, in the reference to the case of *Worthington* vs. *Robbins* (139 U. S., 337), the all-important point has been passed over in silence, that the tariff provision under discussion there was for "watch materials." It was therefore that the Court held that the *use* of the enamel was important in affixing the duty; and had we to do here with a provision for "gun

materials," the stocks would clearly show, without the necessity of catechising their importers, that they were dutiable thereunder. But we have not. The language of the statute is plain and unambiguous, and the case is clearly within the reasoning of Mr. Justice Lamar where, in Dwight *vs.* Merritt (140 U. S., 213), he says: "All the various questions of utility and adaptation of the merchandise imported are not supposed to enter into the decision of the collector in determining its dutiable classification, under the rule in Worthington *vs.* Robbins."

5.

No rule of law is better settled than this: that each invoice and entry constitute a separate importation, and must be appraised and classified without reference to any other invoice or entry, preceding or subsequent thereto.

Sampson *vs.* Peaslee, 61 U. S., 571.

In that case the importer sought to have two entries considered as a single one for the purpose of the assessment of duty, and he showed that the goods included in the two entries formed but a single purchase. This Court ruled that the law prohibited such a course, pointing out that a separate entry must be made for each lot of goods which was imported, each transaction with the Custom House, and when made, must be classified and adjusted as complete in itself. It is inconceivable that, if the collector had stood for the joint liquidation of the two entries instead of the importer, the ruling of this Court would have been other than it was. Yet that is what the appellant contends for

in this case. The remission of this rule of law would not only open the door to endless confusion and uncertainty; it would close it upon all method and safety in the collection of the revenue. If two entries and invoices may be grouped together under a single classification and assessment, so may two hundred. The results of such a practice can be more easily imagined than described, and it is easy to see why the rule in Sampson *vs.* Peaslee has remained unchallenged for so many years.

6.

Equally well settled is the proposition that the intent wherewith an importation is made does not affect the rate of duty to which it is subject.

Merritt *vs.* Welsh, 104 U. S., 694.

Here an importer of sugars had made up a grade of sugar not known when the law was framed, and which combined a high and valuable degree of saccharine strength with a low color test—the test imposed by the law. Yet the Court ruled that the intent to get a sugar which would pay a low rate of duty was not a matter on account of which the law was to be strained or modified in its application.

And the very act under which the case at bar arises, shows how thoroughly Congress has recognized and acted upon this rule, for in numerous paragraphs, such as 47 (Opium, aqueous extract of, *for medicinal uses*), 185 (steel-tired wheels for railway purposes), 383 (wool, changed in character for the purpose of evading the the duty), 482 (animals imported specially for breeding purposes), 510 (bolting cloths, especially for

milling purposes), it has been clearly provided that in the cases named the intent *shall* govern. In Robertson *vs.* Gerdau (132 U. S., 454), Mr. Justice Blatchford says: "If Congress had intended in either enactment of the Revised Statutes, to impose the same duty on parts of musical instruments which is imposed on musical instruments, it would have been easy to impose that duty on 'musical instruments of all kinds, and parts of the same.'" So, here, if Congress had meant that intention should govern the duty on any article, it would have been easy to say so. Where it did so mean it *did* say so. *Expressio unius, exclusio alterius.* In Worthington *vs.* Robbins (139 U. S., 337), this Court rules: "The dutiable classification of imported articles must be ascertained by an examination of the imported article itself, in the condition in which it is imported." In the case now under discussion, the classification of these gun stocks was sought to be ascertained by an examination of the importer as to his intent, and a contemplation of a condition into which the imported article might perhaps be put by joining it with other imported articles subsequent to its importation.

7.

Analogous to the rule last cited is the one:

That every merchant has the right so to arrange his importations as to bring them in at the lowest rate possible.

United States *vs.* Breed, 1 Sumner, 159, 166.
Merritt *vs.* Welsh, 104 U. S., 694.
Seeberger *vs.* Farwell, 139 U. S., 608.
Magone *vs.* Luckemeyer, 139 U. S., 612.

The language of the Court in these cases is more significant than the supposed difference in facts between them and the case at bar, on which the Solicitor-General has laid such stress, and we think it warrantable to quote therefrom at some length. In United States *vs.* Breed, the learned Justice Story said in charging the jury: "If the Legislature has made the form, or descriptive appellation, the basis of the discriminating duty, then the change of form to meet the discrimination, is no evasion, and no fraud. The act gives the election to the party, and he has a right to make it. He does that which the law allows, in the very manner and with the very design, it allows."

In Merritt *vs.* Welsh, Mr. Justice Bradley read the decision of this Court, and said: "Great stress is laid on the charge that sugars are manufactured in dark colors on purpose to evade our duties. Suppose this is true; has not a manufacturer the right to make his goods as he pleases?" And, again: "If this be so, it is no more than every manufacturer does, namely, so to manufacture his goods as to avoid the burden of high duties." "So long as no deception is practiced; so long as the goods are truly invoiced and freely and honestly exposed to the officers of customs for their examination, no fraud is committed, no penalty is incurred."

In the more recent cases of Seeberger *vs.* Farwell, and Magone *vs.* Luckemeyer, this doctrine is reaffirmed. This Court quotes with approval the language of the Circuit Judge, as follows: "Congress having made special provision for a lower rate of duty upon goods when composed in part of wool, * * * the Court was of opinion that manufacturers and importers had a right to adjust themselves to the foregoing clause of the tariff, and to manufacture the goods with only a small percentage of cotton, for the purpose of making them dutiable at the lower rate." The case now under argument

is almost immeasurably further from being an evasion than were those above cited. There is here no specious way of making goods so as narrowly to avoid a provision for high duty, but, on the contrary, a frank acceptance of the situation which made the importation of completed guns unprofitable, and a consequent practice of importing the separate parts and making them into the guns in this country and by domestic labor. How unjust, then, are the derogatory epithets used by our learned antagonist. The proceedings of the appellees are as open and honest as the day.

8.

Parts of articles are not covered by provisions in a tariff act for those articles complete.

Robertson *vs.* Gerdau, 132 U. S., 454.

This is the familiar case as to ivory slips for piano keys, and the Court ruled with great distinctness that no intent to cover parts by a provision for the whole only, can be recognized, in an act where Congress has in several paragraphs explicitly provided for the parts as well as the whole. Such an act is also the one under which the present case arises. In its paragraphs—154, 155, 165, 167, 185—are distinct provisions for articles, "and parts thereof." It is, therefore, manifestly improper to hold that the provision for shot guns, which contains no such language, nevertheless includes and covers parts of such guns.

But we are met here with a proposition of our learned opponent, to the effect that one of the paragraphs of an Act of 1795 distinctly makes the parts

of every article, when imported, duitable at the rate provided for such entire article, and that this provision is still in force. Surely the Solicitor-General is to be congratulated upon the diligence evinced by the discovery of this archaic statute, of which this Court and the Treasury Department, as well as his own office, would seem to have been unaware for many decades, if, as he suggests, it is still in force. Our opponent admits that it is marked "obsolete" in the statute, and our suggestion of the reason for this is, that it *is* obsolete. The provision in question was appended in the Act of 1795 to several specific provisions for duty on different articles. Its position in the act, and the nature and preamble of the act, show, we think, that it was intended to be applied to the then existing tariff laws for their interpretation. This view is fortified by the words of the provision, viz.: "*Where* any article *is* by any law," etc. Had Congress intended this paragraph to outlive subsequent tariff enactments, it would have said: "*When* any entire article *is or shall be* by any law," etc. As the paragraph was worded, it was clearly for application to the then existing tariff laws, and not to any which might thereafter be enacted. He thinks it cannot be deemed repealed unless "some action of Congress" to that effect be found. We think several such actions can be found, especially in the light of the rule on that subject enunciated by this Court in Tracy *vs.* Tuffly (134 U. S., 206, 223), which is as follows: "While it is true that repeals by implication are not favored by the courts, it is settled that, without express words of repeal, a previous statute will be held to be modified by a subsequent one, if the latter was plainly intended to cover the whole subject embraced by both, and to prescribe the only rules in respect to that subject that are to govern." Only adding that repeals by implication are naturally

more common in tariff acts than elsewhere, we proceed to enumerate a few of the "actions of Congress," each of which was sufficient to repeal or render obsolete the provision cited by our opponent. The Act of 1816 (approved April 27, 1816, 3 U. S. Stat. L. 310), provided that from and after its date "the duties heretofore laid by law on goods, wares and merchandise imported into the United States, *shall cease and determine*," and then proceeded to lay a new system of such duties. It can scarcely be disputed that duties were laid by the paragraph of the Act of 1795 quoted by our opponent, and, if they were, its life ceased and determined in 1816, if indeed it had lived until that year. Had the Act of 1795 survived this law and also the similar provisions in the several general tariff acts subsequently passed prior to 1873, the Revised Statutes would surely have given it its quietus. As to their effect, Mr. Justice Lamar said in Dwight *vs.* Merritt (140 U. S., 213): "The Revised Statutes are not a mere compilation and consolidation of the laws of Congress in force on the 1st of December, 1873. The object of that revision was to simplify and bring together all statutes and parts of statutes which, from similarity of subject, ought to be brought together, to expunge redundant and obsolete enactments," etc. And further on: "The title of the Revised Statutes headed, 'Duties upon Imports,' is manifestly intended to be a complete system of tariff legislation, and to embrace and provide for every class of imported articles subject to import duties." In like manner the general tariff acts of 1883 and 1890 must be deemed to be complete substitutes for all pre-existing legislation on these subjects, at least so far as concerns the provisions as to rates of duty. The latter has been held to be such complete substitute, in the case of Strauss, 46 Fed Rep., 522, by the Circuit Court in New York.

In view of these considerations, it would seem

G. A. 973 (S. 12,111). Pieces of leather cut out, ready for sewing together to form a glove. Held to be not gloves, but manufacturers of leather merely.

G. A. 1066 (S. 12,252). Embroidered and unembroidered parts of robes imported together, held separately dutiable when distinguishable in fact.

G. A. 1688 (S.). Metal movements for onyx (marble) clocks, imported with the marble portions, but separately packed and invoiced, held dutiable separately as manufactures of metal.

G. A. 1706 (S.). Shotguns and barrels, imported together but separately shown on invoice, held separately dutiable.

G. A. 1718 (S.). Printed pictures mounted in tin frames and invoiced as entireties, held nevertheless to be separately dutiable.

G. A. 1735 (S.). Willow baskets holding glass pitchers, separately shown on invoice, held separately dutiable.